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Supreme Court, U.S.
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No. 92-1776

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MOSSIE JOHNSON, - - - - - Petitioner

versus

DENNIS LYNCH, d/b/a FORREST HILLS SHOPPING CENTER, and ROSE'S STORES, INC. - - - Respondents

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Petition For A Writ Of Certiorari To The Court of Appeals Of Kentucky

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BRIEF FOR RESPONDENT

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June 3, 1993

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QUESTIONS PRESENTED

1. Does petitioner's alleged loss, even though negligently caused, amount to a "deprivation" in violation of the due process clause of the Fourteenth Amendment of the United States Constitution when, (a) the loss did not occur as a result of some established state procedure, but as a result of the unauthorized failure of the state's agents to follow established state procedures, (b) no contention is made that the procedure established by the state was inadequate, (c) no contention is made that it is practicable for the state to provide a predeprivation hearing, (d) the state itself provides a remedy to persons who believe they have suffered a tortious loss at the state's hands, and (e) the state remedies provide the petitioner with all the relief which may have been available if she were allowed to proceed with her civil cause of action?

2. Does the state's limitation of action scheme rationally advance a reasonable and identifiable governmental objective of timely disposing of personal injury claims?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii
Statutes Involved	iv–v
Statement of the Case	1
Summary of Argument	2–3
Argument	3–7
I. Petitioner was accorded due process when her cause of action was terminated for her failure to comply with a reasonable procedural rule.	3–6
II. The state's classificatory scheme rationally promotes the state's reasonable and identifiable governmental objective.	6–7
Conclusion	7

TABLE OF AUTHORITIES

PAGE

Cases:

Mullane v. *Central Hanover Bank & Trust Co.*, 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950) . 2

Logan v. *Zimmerman Brush Co.*, 455 US 422, 71 L Ed 2d 265, 102 S Ct 1148 (1982) 2, 4–6

Casey v. *Newport Rolling Mill Co.*, 156 Ky. 623, 161 S.W. 528 (1913) 4

Simpson v. *Antrobus*, 260 Ky. 641, 86 S.W.2d 544 (1935) 4

Delong v. *Delong*, Ky., 335 S.W.2d 895 (1960) 4

Commonwealth, to Use of Green v. *Johnson*, 123 Ky. 437, 96 S.W. 801 (1906) 6

Jeffers v. *Taylor*, 178 Ky. 392, 198 S.W. 1160 (1917) 6

Parratt v. *Taylor*, 451 US 527, 68 L Ed 2d 420, 101 S Ct 1908 (1981) 6

Schweiker v. *Wilson*, 450 US 221, 235, 67 L Ed 2d 186, 101 S Ct 1074 (1981) 7

Constitutional Provisions:

United States Constitution, Amendment XIV 2–7

Kentucky Constitution, Section 103 5

Statutes:

Ky. Rev. Stat. §30A.030 5

Ky. Rev. Stat. §30A.140 4

Ky. Rev. Stat. §413.140 ..... 2, 4

Ky. Rev. Stat. §413.250 ..... 2, 4

Miscellaneous:

Ky. R. Civ. P. Rule 3 2

Ky. R. Civ. P. Rule 4.01 4

STATUTES INVOLVED

United States Constitution, Amendment XIV (14), Section One (1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Constitution, Section 103, Bonds of county officers and other officers:

> The Judges of County Courts, Clerks, Sheriffs, Surveyors, Coroners, Jailers, Constables, and such other officers as the General Assembly may, from time to time, require, shall before they enter upon the duties of their respective offices, and as often thereafter as may be deemed proper, give such bond and security as may be prescribed by law.

Ky. Rev. Stat. §30A.030 Bond of clerks, deputies and other personnel:

> (1) All clerks, deputy clerks, and other persons employed in the office of the clerk shall be bonded to the Commonwealth for the faithful performance of their duties and for the accounting of all funds which may come into their hands by virtue of their office. They shall be covered by the blanket bond for all elected or appointed state officials.
>
> (2) No other bond shall be required for performance of duty by the clerk, and any statute to the contrary is repealed to the extent of the conflict.

Ky. Rev. Stat. §30A.140 Additional duties of clerk:

> Every clerk shall perform such additional duties as may be prescribed by statute or court rule.

Ky. Rev. Stat. §413.140 Actions to be brought within one year:

> (1) The following actions shall be commenced within one (1) year after the cause of action accrued:
>
> (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice or servant.

Ky. Rev. Stat. §413.250 When action commences:

> An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action.

Ky. R. Civ. P. Rule 3. Commencement of Action:

> A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.

Ky. R. Civ. P. Rule 4.01 Summons; Issuance; By Whom Served:

> Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons . . .

No. 92-1776

IN THE

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October Term, 1992

MOSSIE JOHNSON, - - - - - - - - - *Petitioner,*

v.

DENNIS LYNCH, d/b/a FORREST HILLS SHOPPING CENTER, and
ROSES STORES, INC. - - - - - - - - *Respondents.*

Petition For A Writ Of Certiorari
To The Court of Appeals Of Kentucky

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner, Mossie Johnson, was injured on September 13, 1989 when she allegedly fell on a concrete barrier at the Rose's Department Store in Corbin, Kentucky. On September 10, 1990 she submitted her complaint in the underlying action to the Whitley County Circuit Court Clerk. Summonses on the complaint were not issued by the Whitley County Circuit Clerk until September 14, 1990, one day after the applicable statute of limitations had expired. Both respondents filed Motions to Dismiss on the

basis that the action was not timely initiated. The Whitley Circuit Court granted said motions on the grounds that the complaint was not timely filed within the applicable statute of limitations as set forth in Kentucky Revised Statutes §413.140 and Kentucky Revised Statutes §413.250. (hereinafter KRS).

Petitioner appealed to the Court of Appeals of the Commonwealth of Kentucky preserving the one issue before the court today; whether or not the trial court's Order of Dismissal violated petitioner's due process and equal protection rights under the Fourteenth Amendment. The Court of Appeals affirmed the trial court's dismissal holding that the petitioner's civil action was not timely commenced pursuant to Rule 3 of the Kentucky Rules of Civil Procedure, which provides that an action is commenced by the filing of a complaint *and* the issuance of a summons, and KRS 413.250, which provides that an action shall be deemed to commence on the date of the issuance of the first summons. Since the first summons was issued on the 14th day of September, 1990, the petitioner's action was held to be appropriately dismissed as time barred by the one-year statute of limitations provided in KRS 413.140.

Petitioner filed a Motion for Discretionary Review in the Supreme Court of Kentucky. An Order Denying Discretionary Review was entered on February 10, 1993 by the Supreme Court of Kentucky. Petitioner has petitioned this Court for a Writ of Certiorari and the respondent, David Lynch, d/b/a Forest Hills Shopping Center, now files his Brief in Opposition.

SUMMARY OF ARGUMENT

Admittedly, petitioner's cause of action is a species of a property protected by the Fourteenth Amendment's due process clause. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950). *See also*

Logan v. *Zimmerman Brush Co.*, 455 US 422, 71 L Ed 2d 265, 102 S Ct 1148 (1982). However, petitioner was accorded due process when her cause of action was terminated for her failure to comply with a reasonable procedural rule. The state, in this instance, provides an adequate post-deprivation remedy which is now available to the petitioner. Petitioner's cause of action now lies against the Whitley County Circuit Court Clerk for its failure to forthwith issue the required summons. This latter remedy would allow petitioner to recover money damages, the only damages available in petitioner's underlying litigation. As such, the petitioner fails to establish a Fourteenth Amendment violation.

The state has a legitimate governmental interest in requiring the timely disposition of personal injury claims. As conceded by the petitioner, the state, through its limitation period, achieves this result in a rational manner. The petitioner was charged with knowing the limitation requirements and it was her own lack of diligence in initiating her claim which differentiates her cause of action. The state's classificatory scheme rationally promotes the state's reasonable and identifiable governmental objective.

ARGUMENT

I. Petitioner was accorded due process when her cause of action was terminated for her failure to comply with a reasonable procedural rule.

This Court has held that states "may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case filing fees. And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan* v. *Zimmerman Brush Co.*, 455 US 422, 437, 71 L Ed 2d 265, 102 S Ct 1148 (1982) (citations omitted). The Kentucky Legislature has enacted a one-year statute of limita-

tions for filing a personal injury action. *See* KRS 413.140. Rule 3 of the Kentucky Rules of Civil Procedure provides that a civil action is commenced by the filing of a complaint *and* the issuance of a summons. Petitioner claims to have been injured on September 13, 1989. KRS 413.250 provides that an action shall be deemed to commence on the date of the issuance of the first summons. Pursuant to CR 3 and KRS 413.250, therefore, petitioner's action must be deemed to have been commenced on September 14, 1990, the date on which the first summons was issued and one day after the one-year statute of limitations had run.

KRS 30A.140 directs every circuit court clerk to perform "such additional duties as may be prescribed by statute or court rule." CR 4.01 prescribes that "upon the filing of the complaint, (or other initiating document) the clerk shall forthwith issue the required summons. . ." In this case, the clerk did not issue the summons until four days after the filing of the complaint. However, in Kentucky, a plaintiff is charged with knowing that a summons must be issued by the clerk. *Casey* v. *Newport Rolling Mill Co.*, 156 Ky. 623, 161 S.W. 528 (1913). At a hearing on the motion to dismiss, no evidence was presented showing that petitioner's counsel alerted the clerk that the summons needed to be issued no later than September 13, 1990, or that counsel verified with the clerk that the summons had actually been issued. It is well established by Kentucky case law that a failure to have a summons issued within the statute of limitations is fatal to a cause of action. *Casey* v. *Newport Rolling Mill Co.*, 156 Ky. 623, 161 S.W. 528; *Simpson* v. *Antrobus*, 260 Ky. 641, 86 S.W.2d 544 (1935); *Delong* v. *Delong*, Ky., 335 S.W.2d 895 (1960).

Petitioner continues to rely on this Court's decision in *Logan* as the basis of her appeal. The issue in *Logan* was whether a state may terminate a complainant's cause of action because a state official, for reasons beyond the

complainant's control, failed to comply with a statutorily-mandated procedure. Although the employee in *Logan* timely filed his complaint with the Illinois Fair Employment Practices Commission, the Commission failed to conduct a conference within the statutorily-mandated time period. The employer moved to dismiss the complainant's charge because the Commission had failed to hold a conference in a timely fashion. The Commission rejected this request.

On appeal, the Supreme Court of Illinois found the legislative language to be mandatory and, accordingly, held that the failure to comply with the statutorily-mandated period deprived the Commission of jurisdiction to consider the complaint. This Court reversed, holding that the appellant was deprived of a protected property interest in violation of the due process clause of the Fourteenth Amendment because the state's interest in refusing his procedural request was outweighed by his private interest and the length or finality of the deprivation.

In *Logan* the state system itself deprived the complainant of his property interest. Here, in contrast, the petitioner does not contend that the procedure established for initiating her cause of action was constitutionally inadequate, nor does she contend that the loss of her cause of action occurred as a result of the established state procedure. Petitioner's loss, if any, occurred as a result of a random and unauthorized failure of the state's agent, in this case the Whitley County Circuit Clerk, to follow established state procedures.

However, Johnson is not without a remedy for the clerk's action, or inaction, in the instant matter. Section 103 of the Kentucky Constitution requires that circuit court clerks post such bond as prescribed by law. KRS 30A.030 requires that all clerks shall be bonded for the faithful performance of their duties.

There is sufficient Kentucky case law to support the petitioner's cause of action against the Whitley County Circuit Court Clerk. Such clerks have been found liable for errors committed in their ministerial functions and also in damages for the negligent and careless acts of their deputies. *See Commonwealth, to Use of Green* v. *Johnson*, 123 Ky. 437, 96 S.W. 801 (1906); *Jeffers* v. *Taylor*, 178 Ky 392, 198 S.W. 1160 (1917).

While a post-deprivation remedy would have been inadequate in *Logan*, the post-deprivation remedies available to Johnson in the instant action are adequate, and accord petitioner all the process due her under the Fourteenth Amendment. *Parratt* v. *Taylor*, 451 US 527, 68 L Ed 2d 420, 101 S Ct 1908 (1981). As in *Parratt*, "[i]t is difficult to conceive of how the state could provide a meaningful hearing before the deprivation takes place." *Id.*, at 541, 68 L Ed 2d 420, 101 S Ct 1908. As such, petitioner fails to establish a Fourteenth Amendment violation. *Logan*, 455 US 422, 71 L Ed 265, 102 S Ct 1148.

II. The state's classificatory scheme rationally promotes the state's reasonable and identifiable governmental objective.

The petitioner concedes that the Commonwealth of Kentucky has a legitimate governmental interest in requiring the timely disposition of personal injury claims. Petitioner also concedes that the state, through its limitation period, achieves this result in a rational manner. Petitioner contends that the pertinent statutes and rules, acting together, and, as applied here, bar petitioner's cause of action when a clerk fails to issue a summons within the statute of limitation period. However, once again, the petitioner, through her own admission, was charged with knowing the limitation of actions requirements.

Petitioner's own lack of diligence in initiating her claim differentiates her cause of action from those who initiate

their claim with due diligence. This classification is rationally related to the state's interest of timely presentation of claims and is, in fact, the justification for the classification. Clearly, the classificatory scheme rationally promotes the state's reasonable and identifiable objective. *Schweiker* v. *Wilson*, 450 US 221, 235, 67 L Ed 2d 186, 101 S Ct 1074 (1981).

CONCLUSION

The petitioner has been afforded due process by the Commonwealth of Kentucky when it terminated petitioner's cause of action by a reasonable procedural rule. The state itself has provided petitioner with an adequate post-deprivation remedy which the petitioner is now free to pursue. This post-deprivation remedy would make petitioner as whole as a suit on the merits in the original action. Petitioner has also failed to prove an equal protection violation under the Fourteenth Amendment of the United States Constitution. Petitioner's classification was due to her own lack of diligence in initiating her claim. This classification is directly related to the state's interest in requiring litigants to timely initiate their action. For these various reasons, the Petition for Writ of Certiorari should be denied. Respondent requests that this petition be denied and that the appropriate Order be entered.

Respectfully submitted,

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